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No. _____

Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

DANA LYNN MEHEN,

Petitioner,

vs.

DELTA AIRLINES, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Ninth Circuit Court Of Appeals

SUPPLEMENTAL APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Dana Lynn Mehen, Plaintiff, vs. Delta airlines, Inc., et al., Defendants.	)	No. CV 02-595-TUC-CKJ **ORDER** (Filed May 11, 2005)

Pending before the Court is Delta Airlines Inc.'s ("Delta") Motion for Summary Judgment and the Motion for Summary Judgment of the Administrative Committee of Delta Airlines, Inc.; the Administrative Subcommittee of Delta Airlines, Inc.; the Delta Family-Care Disability and Survivorship Plan and the Delta Family-Care Medical Plan (hereinafter, the "ERISA Defendants"). For the reasons stated below, Delta's Motion for Summary Judgment and the ERISA Defendants' Motion for Summary Judgment seeking to dismiss Plaintiff's claims are granted; however, the ERISA Defendants' Motion for Summary Judgment on the counterclaim is denied.

I. STANDARD OF REVIEW ON A MOTION FOR SUMMARY JUDGMENT

Summary judgment is appropriate where "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). A genuine issue exists if "the evidence is such that a reasonable jury could return a verdict for

the nonmoving party," and material facts are those "that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is "material" if, under the applicable substantive law, it is "essential to the proper disposition of the claim." *Id.* An issue of fact is "genuine" if "there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way." *Id.* Thus, the "mere scintilla of evidence" in support of the nonmoving party's claim is insufficient to defeat summary judgment. *Id.* at 252. However, in evaluating a motion for summary judgment, "the evidence of the nonmoving party is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255.

II. FACTUAL BACKGROUND

As a threshold matter, the Court notes that Plaintiff's exhibits in opposition to the motions for summary judgment were not attached to Plaintiff's statement of facts, the exhibits are not bound together in one stack, and there are no exhibit tags protruding from the exhibits allowing easy identification. Further, Plaintiff only filed copies of these exhibits with the Clerk's Office, but failed to file copies of these exhibits with the Court in violation of Local Civil Rule 5.4. Rather, Plaintiff submitted a stack of documents in eight separate manilla envelopes. The Court also notes that Plaintiff submitted approximately 45 exhibits, and that the Plaintiff's Statement of Facts cites to less than half of those exhibits.

Further, to the extent Plaintiff may cite to exhibits in her Statement of Facts or in her briefs, she often fails to specifically discuss and specifically cite the relevant portions. Further, the Court notes that although it has reviewed and considered Plaintiff's exhibits, it is not required to comb through Plaintiff's exhibits in search of a reason to deny Defendants' Motion for Summary Judgment. *See Carmen v. San Francisco Unified School District,* 237 F.3d 1026, 1029-1031 (9th Cir. 2001). To require otherwise would render this Court the lawyer for the Plaintiff, performing the lawyer's duty of setting forth specific facts creating a genuine issue sufficient to defeat the motion. *See id.* Second, only *material* facts are relevant for the purposes of motions for summary judgment. *See* Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Submitting a stack of documents (which often have not been specifically discussed and specifically cited for support) in opposition to a motion for summary judgment have limited value and do not help the Court in determining the key issues. Lastly, besides citing one invalid case that was overturned, the Court notes that Plaintiff fails to cite to any specific authority in her briefs opposing the motions for summary judgment.

A. Long Term Disability

The claims in this case primarily arise out of the ERISA Defendants' decisions denying Plaintiff continued long term disability benefits and COBRA benefits.

Plaintiff began working for Delta as a flight attendant 1977. Since 1994, she has not performed any work for Delta due to various medical conditions which allegedly prevent her from performing any work whatsoever. Plaintiff began receiving short term disability benefits in 1994, and began receiving long-term disability ("LTD") benefits in February of 1995 through the Delta Family-Care Disability & Survivorship Plan ("LTD Plan"). Plaintiff continued to receive benefits under the LTD until September 1, 2000; benefits were discontinued as it was determined that Plaintiff was no longer disabled by the Administrative Committee which is the Plan Administrator and Fiduciary for the LTD Plan. Plaintiff now challenges the final decision of the Administrative Committee affirming the denial of LTD benefits based on the finding that she was no longer disabled as defined by the LTD Plan.

The LTD Plan is an employee benefit plan established and maintained pursuant to ERISA. Section 4.03 relating to qualifications for LTD benefits states:

> The Employee shall be eligible for Long Term Disability provided he is disabled at that time as a result of demonstrable injury of disease (including mental or nervous disorders) which will **continuously and totally prevent him from engaging in any occupation whatsoever for compensation or profit, including part-time work**. (emphasis added).

Further, §12.02 states that the Administrative Committee shall decide all issues under the LTD Plan and that:

> The Administrative Committee **shall have the broadest discretionary authority permitted under law** in the exercise of all of its functions, including, but not limited to, deciding questions of eligibility and interpretation . . . (emphasis added).

Where LTD benefits are denied, a claimant may appeal to the Administrative Subcommittee, and if necessary, may appeal to the Administrative Committee which is the final authority on the administrative appeal.

To remain qualified for LTD benefits, Plaintiff had to show that she continued to meet the LTD Plan's definition of disability. On March 2, 1999, Plaintiff's psychiatrist/occupation medicine specialist, Dr. Gray, stated that Plaintiff was permanently disabled due to fatigue, weakness, and cognitive functions. Subsequently, the LTD Plan asked Plaintiff to attend an independent medical exam ("IME") on June 22, 1999 with Dr. Alkasspooles, an infectious diseases specialist. Dr. Alkasspooles determined that "[u]pon reviewing her physical exam, besides some decrease in strength and maybe decrease in gait, I do not see any other physical limiting factors in this patient." *See* ERISA Defendants' Exhibit B at Meh/LTD 258. As such, Dr. Alkasspooles found that Plaintiff had no physical limitations to performing part-time sedentary work, and the only restriction was lifting heavy

weights. While Dr. Alkasspooles stated that he thought Plaintiff was still disabled, this was based largely on psychological limitations he perceived which were outside his expertise. As such, he recommended that Plaintiff receive psychotherapy with a psychiatrist. The LTD Plan then asked Plaintiff to attend an IME with Dr. O'Brien, a psychiatrist. Dr. O'Brien stated in relevant part:

> [Claimant] has a firm, militant disability conviction. However, there are very few objective findings to support this degree of claimed disability. Basically, Ms. Mehen is unable to work because she feels she is unable to work. There are plenty of people in the workplace who have [a] history of gallbladder problems, thyroid problems, mild depression, mild rheumatologic problems, etc., but they are able to work in some capacity. I have no idea why her doctors have recommended her taking off this much time. In fact, if anything, I think this has been injurious to her condition. This has led to inculcation of learned helplessness and other maladaptive psychological mechanisms. I have seen nowhere in her entire history of illness that she has appeared motivated to work. It is not surprising that she has not shown much improvement since being off work.
>
> It is my opinion that Ms. Mehen is capable of performing her duties as a flight attendant or alternative job occupation. . . . I see no reason, why, on a psychiatric basis, she is

> unable to work. The fact that she is angry and bitter about the system and her preoccupation with somatic symptoms is not a psychiatric preclusion to gainful employment.
>
> I do not believe there are disabling factors. What we are essentially dealing with here is a bad attitude rather than real objective psychopathology.

See ERISA Defendants' Exhibit B at Meh/LTD 267-268. Dr. O'Brien's report was subsequently forwarded to Dr. Alkasspooles. Based on this psychiatric opinion and his prior analysis, he ultimately concluded that Plaintiff could resume working. Based on this evidence, the LTD Plan concluded that Plaintiff no longer met the definition of disabled in the plan and discontinued benefits effective September 1, 2000.

Plaintiff thereafter appealed to the Administrative Subcommittee on October 13, 2000. As part of the appeal, she submitted additional documentation from Dr. Gray, Dr. Brautbar, Dr. Baumzweiger, and Dr. Karam. Dr. Gray continued to conclude that Plaintiff was totally disabled due to various exposures to toxic substances, and that she suffered various disabling ailments including chronic fatigue syndrome. Dr. Brautbar concluded, without explanation, that Plaintiff was totally disabled. Dr. Baumzweiger concluded that Plaintiff was totally disabled and that she was suffering from neurotoxicity. Lastly, a polysonogram was submitted from Dr. Kram, but Dr. Kram offered no opinion as to whether Plaintiff could work.

As part of the appeal, the Administrative Subcommittee scheduled Plaintiff for an IME with Dr. Stoney, a physical medicine and rehabilitation specialist. He concluded that from a "physical standpoint, this patient is able to resume work duty at this time. She can functionally at this time tolerate sitting, standing, walking, clerical duties of filing, and data entry." *See* ERISA Defendants' Exhibit B at Meh/LTD 400. From a psychiatric standpoint, he deferred to Dr. O'Brien as that was his specialty. As such, Dr. Stoney concluded that Plaintiff could begin working performing clerical duties. On April 12, 2001, based on all of the evidence before it, the Administrative Sub-Committee affirmed the prior determination that benefits were correctly denied as Plaintiff was capable of performing some type of work. Plaintiff thereafter took her final administrative appeal to the Administrative Committee. Plaintiff submitted additional reports from Dr. Gray, Dr. Brautbar, and Dr. Baumzweiger who all continued to conclude that Plaintiff was totally disabled. Plaintiff also submitted a report from Dr. Frank, specializing in psychiatry and neurology, who described her overall disability as between slight (20%) to moderate (50%). Dr. Frank's report was originally produced in relation to Plaintiff's separate workers' compensation claim. The Administrative Committee forwarded these materials to Dr. Stoney for his review. These materials did not change Dr. Stoney's opinion that Plaintiff was no longer disabled. Based on the opinions of Dr. Alkasspooles, Dr. O'Brien, and Dr. Stoney, the Administrative Committee found that Plaintiff could resume working in some

capacity, and that she was no longer disabled as defined by the LTD Plan. The Administrative Committee further noted that Dr. Gray's conclusions were largely unsupported by objective findings, that Dr. Brautbar's and Dr. Baumzweiger's statements focused on California workers' compensation requirements, and that Dr. Frank's report actually supported the Administrative Committee's conclusion as Dr. Frank reported that Plaintiff was only slightly to moderately disabled. Accordingly, based on the evidence before it, the Administrative Committee affirmed the denial of Plaintiff's LTD benefits.

B. COBRA/Continuation Coverage

Once Plaintiff initially lost her LTD benefits effective September 1, 2000, she was no longer entitled to continue coverage under the Delta Family-Care Medical Plain ("Medical Plan"). As such, Plaintiff was notified of this situation and informed of her right to temporarily continue coverage under COBRA as of September of 2000. Plaintiff elected to continue coverage, and received COBRA benefits for the standard 18 month period which ended on February 28, 2002. She requested an extension of these benefits beyond the 18 months, which were denied and this denial was affirmed on final administrative appeal by the Administrative Subcommittee. Plaintiff challenges this decision.

The Medical Plan is also an employee benefit plan pursuant to ERISA, and the Administrative

Committee is also the Plan Administrator. Where an employee disagrees with a denial of benefits, the employee is permitted an appeal (which is the final appeal) to the Administrative Subcommittee. The Administrative Subcommittee has the broadest discretion permitted by law in deciding such an appeal in relation to the denial of continued benefits under the Medical Plan. *See* ERISA Defendants' Exhibit C at MP 105 and MP 112.

Section 9.07 of the Medical Plan limits extensions of COBRA benefits beyond the standard 18 months. It states that "[c]ontinuation coverage shall extend for a period of 18 months after the date that regular coverage ceased . . . unless during such 18-month period a subsequent Qualifying Event occurs." *Id.* at MP 97. Regular coverage for Plaintiff ceased on September 1, 2000. Her original 18 month continuation/COBRA coverage began on September 1, 2000 and ended on February 28, 2002. Plaintiff requested to continue coverage because of the alleged subsequent qualifying event that she was determined to be disabled by the Social Security Administration. Section 9.07 provides that an extension beyond the standard 18 month continuation period under COBRA may be authorized only when the person seeking the extension provides notice of the Social Security determination of disability coverage "within (60) days after the date of such determination and before the end of the initial 18-month continuation coverage period." *Id.* at MP 97. The request to continue coverage was originally denied because she was told that her disability did

not start within the first 60 days of her COBRA coverage. On final appeal, the Administrative Subcommittee affirmed the decision on a different ground. It stated that it "is not mandatory that your disability actually start within the first 60 days of COBRA, coverage; however, you must be determined to be disabled by Social Security at any time during the first 60 days of coverage." *Id.* at Meh/Cobra 7. Here, Plaintiff was determined to be disabled by the Social Security Administration on December 30, 1995, effective as of June 26, 1994. Plaintiff was determined to be disabled by the Social Security Administration approximately 6 years prior to the start of her continuation/COBRA coverage on September 1, 2000. As such, the Administrative Subcommittee determined that this event did not occur subsequent to her continuation/COBRA coverage which started on September 1, 2000, and she obviously was not determined to be disabled by Social Security during the first 60 days of COBRA coverage. As such, the Administrative Subcommittee found that the denial of COBRA benefits beyond the original 18 month period was proper.

C. Disability Harassment

Throughout Plaintiff's "Statement of Fact," the entire set of facts essentially focuses on the denial of LTD and COBRA benefits. The only specific reference to disability discrimination is based on Plaintiff's claim of Delta's harassment of her based on her disability in paragraph 26. Paragraph 26 states:

> Mehen has been harassed since her disclosure to Delta Airlines INC. in 1997 that she was a disabled individual. (Exhibits 41, 42, 43, 44, 45). There have been vehicles parked at the entrance to Mehen's, they have been seen driving by Mehen's residence at all hours of the day and night and vehicles have attempted to crash Mehen's front gate. There have also been anonymous phone calls originating in Atlanta, Georgia the headquarters for Delta Airlines INC. and the ERISA defendants, other calls asking question about Mehen."

However, as discussed below, the exhibits cited by Plaintiff do not show that Delta was in any way involved with these actions.

III. DISCUSSION

A. Denial of LTD Benefits, Denial of COBRA Benefits, and Fiduciary Duty

The ERISA Defendants correctly argue that the denial of benefits at issue are governed by the Employee Retirement Income Security Act ("ERISA"). *See* 29 U.S.C. §1001 et seq., 29 U.S.C. §1002(1). As already discussed above, the controlling documents for the plans give the ERISA Defendants the broadest discretionary authority permitted by law. Where such discretion is given, the Ninth Circuit holds that the standard of review is as follows:

> [w]here discretion is conferred upon the [Plan Administrator] with respect to the

> exercise of a power, its exercise is not subject to control by the court except to prevent an abuse by the trustee of his discretion . . . When we review for abuse of discretion, it is because the plan has put the locus for decision in the plan administrator, not in the courts, so we cannot substitute our judgment for the administrator's. We can set aside the administrator's discretionary determination only when it is arbitrary and capricious. We have held that a decision grounded on *any* reasonable basis is not arbitrary or capricious, and that in order to be subject to reversal, an administrator's factual findings that a claimant is not totally disabled must be clearly erroneous.

Jordan v. Northrop Grumman Corp. Welfare Benefit Plan, 370 F.3d 869, 875 (9th Cir 2004) (internal quotes and citations omitted).[1] Further, review is limited to the administrative record before the Plan Administrator at the time of the decision in question

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[1] In arguing that there is a less deferential standard of review due to a conflict of interest, the ERISA Defendants correctly argue that Plaintiff relies on an overturned decision in *Regula v. Delta Family-Care Disability and Survivorship Plan*, 266 F.3d 1130 (9th Cir. 2001), *vacated* 539 U.S. 901 (2003), *judgment* for Plan *affirmed* 354 F.3d 1133 (9th Cir. 2004) (affirming District Court's decision in favor of the Plan based on arbitrary and capricious standard). As such, Plaintiff's argument is without merit. *See also Jordan v. Northrop Grumman Corp. Welfare Benefit Plan*, 370 F.3d at 876 (fact that plan would not have to pay benefits if claim was denied does not create a conflict of interest).

was made. *See id.* at 879. As the Ninth Circuit and Supreme Court have emphasized, disability determinations under ERISA plans are made pursuant to the provisions of the plan itself, as opposed to the criteria set out in Social Security cases for disability. *See id.* at 878-879. Such a determination is distinct from a Social Security disability determination and not governed by rules pertaining to Social Security cases. *See id.* Thus, "a treating physician's opinion gets no special weight and can be rejected on the basis of reliable evidence with no discrete burden of explanation . . . [thus courts are prohibited] from overturning discretionary decisions by administrators because they failed to defer to treating physicians' opinions." *See id.* (citing *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003)). Further, the fact that there is conflicting evidence as to whether a claimant can work does not make the denial of benefits arbitrary or capricious. As the Ninth Circuit found in *Jordan*:

> The administrator here had conflicting reports from [Claimant's] treating physicians and [the Plan's] reviewing physicians. This is typical of the evidence used in disability determinations. Reasonable people can disagree on whether [Claimant] was 'disabled' for purposes of the ERISA plan. Because that is so, the administrator cannot be characterized as acting arbitrarily in taking the view that she was not.

See id. at 880.

Here, the administrative record supports the denial of LTD benefits. The Administrative Committee's decision is supported by the opinions of several different doctors who personally examined Plaintiff. After reviewing Plaintiff's physical exam, Dr. Alkasspooles, a specialist in infectious diseases, determined that Plaintiff had no physical limitations besides some decrease in strength and maybe some decrease in gait. Thus, he determined that Plaintiff was not physically prevented from performing some work. As to her potential mental issues, Dr. Alkasspooles deferred to a professional psychiatric opinion as this was not his specialty. Dr. O'Brien, a psychiatrist, determined that there was no reason on a psychiatric basis why Plaintiff could not resume working. Dr. Stoney, a physical medicine and rehabilitation specialist, also determined that Plaintiff was physically able to resume work. Further, a report submitted by Plaintiff from Dr. Frank also found that Plaintiff was only slightly to moderately disabled. Lastly, the Administrative Committee also noted that opinions from the doctors submitted by Plaintiff were largely unsupported by objective findings and were based on criteria distinct from the definition of disability contained in the LTD Plan. Although there were conflicting opinions as to Plaintiff's disability, the Court can not say that the Administrative Committee's decision to affirm the denial of LTD benefits was arbitrary and capricious as the decision is supported by sufficient evidence from the administrative record. Thus, summary judgment is granted in favor of the ERISA Defendants on this issue.

The denial of the continuation of COBRA benefits was also supported by the record. The Medical Plan limits extensions of COBRA benefits beyond the standard 18 month period. As discussed above, it states that "[c]ontinuation coverage shall extend for a period of 18 months after the date that regular coverage ceased . . . unless during such 18-month period a subsequent Qualifying Event occurs." Regular coverage for Plaintiff ceased on September 1, 2000. Her original 18 month continuation/COBRA coverage began on September 1, 2000 and ended on February 28, 2002. Plaintiff requested to continue coverage based on the fact that she was determined to be disabled by the Social Security Administration. The Medical Plan further provides that an extension beyond the original 18 month continuation period is permissible only if the person seeking the extension provides notice of the Social Security determination of disability coverage "within (60) days after the date of such determination and before the end of the initial 18-month continuation coverage period." Plaintiff was determined to be disabled by the Social Security Administration on December 30, 1995, effective as of June 26, 1994. As such, the Administrative Subcommittee properly determined that this event did not occur subsequent to her continuation/COBRA coverage which started on September 1, 2000, and properly found that she was not determined to be disabled by Social Security during the first 60 days of COBRA coverage as required to continue COBRA benefits beyond 18 months. As such, the Court finds that the decision of the Administrative Subcommittee was not

arbitrary and capricious. Summary judgment is granted in favor of the ERISA Defendants on this issue. Lastly, Plaintiff claims that the ERISA Defendants breached their fiduciary duties by improperly denying LTD and COBRA benefits. However, the Court has already found that benefits were properly denied. As such, summary judgment is granted in favor of the ERISA Defendants on Plaintiff's claim for breach of fiduciary duty for the same reasons stated above in relation to the denial of benefits.

Further, as Delta correctly argues, Plaintiff has no viable claim against Delta for the denial of benefits or for breach of fiduciary duty as the ERISA Defendants, not Delta, was responsible for the denial of benefits. Delta is neither the Plan Administrator or Named Fiduciary. Delta is a separate legal entity from the ERISA Defendants, and as such, can not be held responsible for the ERISA Defendant's denial of benefits under ERISA. *See Gelardi v. Pertec Computer Corp.*, 761 F.2d 1323, 1324-25 (9th Cir. 1985) (per curium); 29 U.S.C. §1132(d)(1) & (2); *Zelder v. Delta Air Lines, Inc.*, 423 So. 2d 945, 946 (Fla Ct. App. 1983). Plaintiff has not provided any authority refuting this conclusion. Accordingly, to the extent Plaintiff is asserting claims against Delta for the denial of benefits or breach of fiduciary duty, summary judgment is granted in favor of Delta.

B. Disability Discrimination

1. Disability Discrimination Based on Termination

Plaintiff first claims that she was terminated based on her disability. However, Delta argues that she was never terminated. *See* Delta's Exhibit B (Affidavit of the Director of Equal Opportunity for Delta stating that Delta never terminated Plaintiff, but had her on the roles as an inactive flight attendant since her claims of disability arose in 1994). Rather, Defendant argues that the evidence Plaintiff relies on for her opinion that she was terminated does not support the conclusion that she was actually terminated by Delta. The Court agrees.

Plaintiff relies on a March 6, 2002 letter from the administrator of the COBRA plan which has the phrase not in "current employment," which she interpreted to mean that she was terminated. However, the letter which denied her request for extended COBRA coverage also addressed the coordination of her COBRA benefits with her Medicare benefits. *See* Delta's Exhibit 2. The letter informed her that Medicare now provided her primary health coverage because she was not in "current employment," which is defined under Medicare regulations. *See id.*; *see also* 42 C.F.R. §§411.104 & 411.20. This letter was also sent from the COBRA plan administrator, who is a separate legal entity from Delta. This letter does not show that she was terminated. Plaintiff also relies on a June 12, 2002 letter from Delta requesting the return of her

identification badge. *See* Delta Exhibit 2. However, this was a form letter sent to employees who were not only terminated, but was also sent to employees who were on inactive status due to an extended leave. This letter does not show that she was terminated.

Plaintiff also relies on inadmissible hearsay to claim that she was terminated. In her deposition, she said that an EEOC investigator stated "something had happened." In her brief, she now says that the EEOC investigator said "something had happened" and "you have been terminated." Although she now claims in her brief that this is based on personal knowledge, she admitted that her knowledge as to this issue was only based on what the EEOC investigator told her. This is inadmissible hearsay which can not be considered by the Court. *See* F.R.E. 801 and 802; FED.R.CIV.P. 56(e). Plaintiff also relies on the notes of the EEOC investigator and the right to sue letter. However, the EEOC notes in question are simply notations of statements made by Plaintiff, and are nonetheless inadmissable hearsay. *See id.* Further, the right to sue letter states that the EEOC is unable to conclude that the information obtained established any discrimination. Lastly, Plaintiff attributes a statement to Annette Frazier from Delta Airlines whereby she allegedly stated "there was no record of Dana Mehen being employed at Delta . . . " However, as Delta correctly argues, this is hearsay to which no exception applies because there is no evidence that Annette Frazier was a Delta manager, that she was authorized to make such a statement relating to

termination, and such a statement was within the scope of her duties at Delta. *See* F.R.E. 801, 802, 801(d)(2); FED.R.CIV.P. 56(e).

Lastly, Defendant correctly argues that Plaintiff has claimed since 1994, and continues to claim today that she is totally disabled and unable to perform any work whatsoever; as such, even if Plaintiff had been terminated, Delta is not liable under the ADA as she is not a "qualified individual" under the ADA and it had no legal obligation to allow her to remain on indefinite leave. *See Kaplan v. City of North Las Vegas*, 323 F.3d 1226, 1230 (9th Cir. 2003) (a person is entitled to protection under the ADA only if is she is a "qualified individual" which means that the employee can perform the essential functions of the job with or without reasonable accommodation); *Wood v. Green*, 323 F.3d 1309 (11th Cir. 2003) (employer was entitled to terminate employee as indefinite leave is not required by the ADA);[2] *Boykin v. ATC/VanCom of Colorado, L.P.*, 247 F.3d 1061, 1064 (10th Cir. 1999) (reasonable accommodation does not require an employer to place an employee on indefinite leave).

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[2] Plaintiff seems to suggest in her brief that there may be a claim for failure to accommodate. However, she never made a failure to accommodate claim in her Amended Complaint, and there is no evidence that she actually requested or Delta received a request to accommodate after her LTD benefits were eventually denied in September of 2000. Rather, it is undisputed Plaintiff has claimed since 1994 that she is totally disabled and unable to perform any work.

2. Disability Discrimination-Harassment/ Hostile Work Environment

Although the Ninth Circuit has not expressly recognized a harassment claim based on disability, other federal appellate courts have treated such a claim under the same standard for a hostile work environment claim under Title VII. *See Silk v. City of Chicago,* 194 F.3d 788, 804 (7th Cir. 1999); *Keever v. City of Middletown,* 145 F.3d 809, 813 (6th Cir. 1998). Thus, as applicable to this case, a prima facie case for a hostile work environment based on disability, Plaintiff must show: "(1) [s]he was subjected to verbal or physical conduct [based on her disability]; (2) that the conduct was unwelcome; (3) that the conduct was sufficiently severe or pervasive to alter the conditions of plaintiffs employment and create an abusive work environment." *Gregory v. Widnall*, 153 F.3d 1071, 1074 (9th Cir. 1998). The conduct in question must be both subjectively hostile to the Plaintiff and objectively hostile from the viewpoint of a reasonable person in Plaintiff's position. *See Nichols v. Azteca Restaurant Enterprises, Inc.,* 256 F.3d 864, 871-872 (9th Cir. 2001). The required level of severity of the work environment "varies inversely with the pervasiveness or frequency of this conduct." *Id.* Whether a work environment is hostile under this standard can only be "determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an

employee's work performance." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993).

As a threshold matter, a review of Plaintiff's deposition and response to Delta's motion for summary judgment shows that many of her claims of harassment are based on the alleged actions of the ERISA Defendants. As Delta correctly argues – the denial of her ERISA LTD benefits, telephone calls requesting additional information relating to her LTD claims and COBRA claims, surveillance[3] of Pat Higgins enlisted by the ERISA Defendants to assess her physical limitations, failure to pay certain medical bills, denial of her request to continue under COBRA, etc. – are all actions which are not attributable to Delta. Rather these were actions taken, by or on behalf of the LTD Plan and Medical Plan. As the Court has already ruled that these are separate legal entities in relation to these issues, Plaintiff can not claim harassment on the part of Delta for these actions. In addition, as to the denial of benefits at issue in this case (LTD benefits and COBRA), the Court notes that it has already found that these benefits were properly denied.

Plaintiff also argues that Delta has harassed her through the use of "thugs" coming to her house, many

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[3] The LTD Plan enlisted an investigator to make a videotape of Plaintiff while she was in public to assess the scope of her physical limitations. Nevertheless, as expressly stated by the Administrative Committee, this was not relied upon in affirming the denial of LTD benefits.

anonymous phone calls at all hours of the night, and various other people coming to her house. Specifically, Paragraph 26 of her "Statement of Fact" states:

> Mehen has been harassed since her disclosure to Delta Airlines INC. in 1997 that she was a disabled individual. (Exhibits 41, 42, 43, 44, 45). There have been vehicles parked at the entrance to Mehen's, they have been seen driving by Mehen's residence at all hours of the day and night and vehicles have attempted to crash Mehen's front gate. There have also been anonymous phone calls originating in Atlanta, Georgia the headquarters for Delta Airlines INC. and the ERISA defendants, other calls asking question about Mehen."

A review of these exhibits submitted in support these allegations shows that Mehen has no evidence whatsoever showing that Delta was involved. Mehen has no evidence of who any of these "thugs" were, or who any of the people who passed by or came to the house were as well. As to the phone calls, because they originated from Atlanta, Georgia she assumes that all of these calls were from Delta because it is based in Atlanta. However there is no actual evidence that these calls were actually from Delta. Rather, a review of the exhibits in question shows that Plaintiff's claims that Delta was involved is based on pure speculation.

Plaintiff also claims in her responsive brief that callers identifying themselves as Delta employees

attempted to get information from her children, asking such questions as "Do you think mommy can work?" and "Does mommy have a new job?." However, as Delta correctly points out, Mehen's deposition testimony reveals that such phone calls were from Delta's attorneys in relation to the litigation at issue, and that such contact from attorneys can not properly be considered harassment attributable to Delta. Further, to the extent that Delta employees asked questions attempting to gain information about Plaintiff's prognosis it relation to her ability to work, such conduct does not arise to the level of an ADA violation. *See Miranda v. Wiscconsin Power & Light Co.,* 91 F.3d 1011, 1017 (7th Cir. 1996). Further Delta opposing Plaintiff's workman's compensation claim was not improper, as even Plaintiff admits that Delta was entitled to take such action under California law.

A review of the record in this case shows that Plaintiff has failed to create a genuine issue of fact that Delta's actions were sufficiently severe or pervasive to alter the conditions of plaintiff's employment and create an abusive work environment. *See Gregory,* 153 F.3d at 1074. Further, as Delta correctly argues, Plaintiff has not performed any work for Delta since 1994. Plaintiff's allegations of harassment arose years after she stopped performing any work for Delta and none of the alleged harassment occurred at work. Thus, there is no evidence and no issue of fact that her work conditions were altered or that an abusive work environment was created as Plaintiff has not been in a Delta work environment

since 1994 which was before any allegations of harassment actually arose. *See id.* Accordingly summary judgment is granted in favor of Delta as to Plaintiff's claims of discrimination pursuant to the ADA. Lastly, the Court notes that it does not appear that Plaintiff's amended complaint has asserted an ADA discrimination claim against the ERISA Defendants. Further, the ADA requires an employee to file a charge of discrimination against a defendant prior to filing a suit against them; here, it is undisputed that Plaintiff's charge of discrimination failed to name the ERISA Defendants in her charge of discrimination. *See* 42 U.S.C. §12117(a) (adopting charge filing requirement in ADA from 42 U.S.C. §12117); *Santa Maria v. Pacific Bell,* 202 F.3d 1170, 1176 (9th Cir. 2000) (charge filing requirement applies in ADA cases); 42 U.S.C. §2000e-5(f)(1) (right to file civil suit against "against the person named in the charge"). Accordingly, to the extent Plaintiff asserts an ADA claim against the ERISA Defendants, summary judgment is granted in favor of the ERISA Defendants on this claim.

C. ERISA Defendants' Counterclaim – Overpayment

Lastly, the ERISA Defendants argue that the benefits due under the Disability and Survivorship Plan are subject to an offset for Social Security benefits received by Plaintiff. The ERISA Defendants are claiming that the LTD Plan made an overpayment to Plaintiff because the Social Security Administration

determined her to be disabled and entitled to benefits effective December 1, 1994. After this date, her monthly Social Security benefit exceeded the amount of her Plan benefit resulting in a overpayment to Plaintiff of $21,197.98, which the ERISA Defendants are seeking to obtain from Plaintiff. However, the ERISA Defendants are not entitled to summary judgment on this claim due to insufficient facts and citation of authority supporting this claim. As to the ERISA Defendants' argument that benefits are subject to an offset, they rely on Statement of Fact ("SOF") Paragraph 3 cites to Exhibit 1A at DP41 which apparently refers to section 7.02(b)(ii) of the LTD Plan which states: "The amount of benefits described in each option above shall be reduced by the amount described in paragraphs (b), (c), (d), (e) and (f) of section 7.01 of the Plan." Although Exhibit 1A includes various excerpts of the LTD Plan, section 7.01 (which presumably discusses various offsets) is not included in Exhibit 1A for the Court's review. In addition, to support their claim for $21,197.98, the ERISA Defendants only attach various handwritten notations and fill in the blank forms. *See* SOF ¶13. However, the ERISA Defendants have not submitted an affidavit, deposition testimony, or similar evidence explaining in detail how the $21,197.98 amount was reached. Lastly, in regards to the ERISA Defendants claim for overpayment in both their initial motion for summary judgment and reply brief, they cite no legal authority entitling them to reimbursement of the $21,197.98 from Plaintiff. *See* ERISA Defendants Motion for Summary Judgment at 17 and Reply Brief at 10.

Local Civil Rule 7.2(c) requires a party to set forth "points and authorities relied upon in support of the motion." Local Civil Rule 7.2(i) states that substantial noncompliance with Local Rule 7.2 may be deemed a consent to summarily denying the motion. Accordingly, as there are insufficient facts and authority to support the ERISA Defendants' argument, the ERISA Defendants Motion for Summary Judgment as to the claim for overpayment is denied.

IV. CONCLUSION

Accordingly, IT IS HEREBY ORDERED as follows:

(1) The ERISA Defendants' Motion for Summary Judgment seeking to dismiss Plaintiff's claims is **granted**;

(2) Delta's Motion for Summary Judgment is **granted**;

(3) The ERISA Defendants' Motion for Summary Judgment on their counterclaim is **denied**;

(4) In light of these rulings, the ERISA Defendants' counterclaim is the only remaining claim in this case. Pursuant to the Court's Scheduling Order, if the ERISA Defendants wish to proceed to trial on the counterclaim, the Joint Pretrial Statement and Motions in Limine are due within 30 days of the filing date of this Order. Alternatively, the parties may file a stipulation for dismissal, or engage in a settlement conference with a Magistrate Judge at no cost to the parties.

DATED this 4th day of May, 2005.

/s/ Cindy K. Jorgenson
Cindy K. Jorgenson
United States District Judge